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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

CHARLES A. WILLIAMS,

Petitioner,

vs.

GEORGE H. KYGER AND MARIE KYGER,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petitioner, Charles A. Williams, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered December 23, 1953, which judgment affirmed the judgment of the Court of Appeals of Butler county, Ohio, filed on September 26, 1953, which affirmed the judgment of the Common Pleas Court of Butler county, Ohio, filed on March 30, 1953, quieting title to real estate which is the subject of this lawsuit.

Charles A. Williams,
Petitioner.

Statement of Matter Involved.

This action is an appeal from a decision of the Supreme Court of Ohio as follows:

> "It is ordered and adjudged that this appeal as of right be, and the same is, dismissed for the reason that no debatable constitutional question is involved.
>
> Appeal dismissed."

It affirms the decision of the Court of Appeals of Butler county, Ohio, affirming a decision of the Common Pleas Court of Butler county, Ohio, in a suit brought by respondents to "quiet title" in themselves to the west five (5) feet of the east one hundred four (104) feet of Inlot #106 of Miami University 99-year perpetual leasehold property located in the business district in the village of Oxford, Ohio, title to which was awarded respondents "in fee simple" by the Court of Common Pleas.

Said Inlot #106 is a rectangular lot extending one hundred sixty-five (165) feet east and west and sixty-six (66) feet north and south.

Your petitioner represents that he and the respondents are but lessees and the owners of 99-year perpetual leases from Miami University, as shown by its land title records, and according to the deed records of the Butler county, Ohio, recorder's office; that your petitioner has a consistent chain of title to the east one hundred four (104) feet of said Inlot #106, and that the respondents have a consistent chain of title to the west sixty-one (61) feet thereof, and no more.

Chain of Title.

Prior to July 7, 1920, a lease to the entire of Inlot #106 was owned by Zora Beckett.

See Exhibit A. Photostatic copy of Butler county, Ohio, Deed Record 174, page 565, admitted by stipulation (Record, p. 74.)

On that day he conveyed to William E. and Edmund A. Keen, your petitioner's predecessors in title, the east 104 feet thereof by warranty deed subject to Miami University annual ground rent.

Also, as a part of the same transaction, and contemporaneously therewith the above-named parties entered into a subdivision agreement with Miami University in accordance with an Act of the Ohio legislature passed March 28, 1862 amending an Act entitled **laws regulating the subdivision of lands belonging to Miami University.**

See laws pertaining to Miami University 1909, page 93. Also see Petitioner's Exhibit 1 for photostatic copy of Beckett-Keen-Miami University agreement. (Record, p. 111.)

By its terms your petitioner's predecessors and successors were henceforth to lease and pay a stipulated annual land rent to Miami University on the east 104 feet of Inlot #106 in the village of Oxford, Butler county, Ohio.

By the same instrument, the respondents' predecessors and successors in title were required to pay annual rent on the west 61 feet of said inlot. An exact copy of the agreement is as follows:

> "Whereas, Zora Beckett and William E. with Edmund A. Keen the present owners of Inlot No. 106 in the Village of Oxford, Butler County, Ohio being a part of the lands granted by Congress for the endowment of Miami University, have made application to the Treasurer and Secretary of said University to have said premises sub-divided, so that each owner can have

their respective parts entered separately on the books of the University;

And whereas, in accordance with a law of the State of Ohio, passed March 28, 1862, and an ordinance of the Trustees of Miami University, passed July 3, 1862, in relation to the sub-division of lands and lots belonging to said University, to said owners and the said Trustees have agreed upon the amount of rent to which each of said sub-divisions shall be subject.

Now, therefore, the said Zora Beckett and William E. with Edmund A. Keen and the said Trustees, in consideration of the premises, do hereby mutually agree that the West 61 feet of said Inlot No. 106 shall be subject to the payment of One and 58/100 Dollars and that the East 104 feet of said Inlot 106 shall be subject to the payment of Two ($2.00) Dollars and subject to all the terms, conditions and penalties described in the original lease of said premises.

In testimony whereof, the Trustees of Miami University, by the Secretary and Treasurer, and said ..... have hereunto set their hands and seals this ..... day of ....., A. D., 19....

W. P. Roudebush, Secretary
C. A. Shera, Jr., Treasurer
Zora Beckett,
William E. Keen
Edmund A. Keen"

(The reverse side of the original Agreement shows the following:)

Z. Beckett and
Ed & Wm. Keen
1920
Inlot #106
(Record, p. 111.)

On January 4, 1928, said Zora Beckett conveyed the west 61 feet of said Inlot #106 by strict measure to E. L. Miller and M. L. Miller.

See Exhibit E. Photostatic copy of Butler county, Ohio, Deed Record 281, page 40, admitted by stipulation. (Record, p. 127.)

After several intervening conveyances, on July 13, 1946, your petitioner acquired a leasehold title to the east 104 feet of Inlot #106 aforesaid.

Also, after several intervening conveyances, on June 30, 1941, respondents acquired a lease to the west 61 feet of said Inlot #106.

Note: The conventional method used for assigning a lessee's interest to another in Miami University lands is by warranty deed, subject to Miami University land rent and excepting Miami University claims therein, and the term "owner" in this brief means lessee unless otherwise specified.

How This Action Arose.

The respondents desired for their own use for building purposes the west 5 feet of your petitioner's east 104 feet of Inlot #106.

On correctly anticipating your petitioner's unwillingness to sell them the same, and shortly before bringing this action to quiet title in the Butler county, Ohio, Common Pleas Court, your respondents obtained on November 2, 1950, from the heirs at law of said Zora Beckett, a quit claim deed to the entire of said Inlot #106 by fraudulent misrepresentation, coercion and threat of lawsuit.

(For exhibits, see copies of correspondence attached to motion for rehearing before the Butler county Court of Appeals.)

After acquiring the aforementioned quit claim deed from the Beckett heirs, and thus fortified, the respondents then instituted this lawsuit to "quiet title" in themselves on January 19, 1951, and claim absolute ownership in "fee simple," not only that portion of Inlot #106 they were permitted by the easement granted in the Beckett-to-Keen

deed to build a roof over and use an entrance through; but in addition, they have laid absolute claim in "fee simple" to all the vacant unfenced ground 5 feet in width lying northwest of the theatre building proper for a distance of 45½ feet and extending to the north line of Inlot #106, totally disregarding their predecessors' contract with Miami University, the true owner of the fee simple title.

Your respondents claimed ownership of the 5-foot strip by reason of their quit claim deed from the Zora Beckett heirs.

In addition, they argued that they had found a defect in the descriptions in your petitioner's chain of title with reference to the original location of an iron pin which has always been under their own and their predecessors' exclusive protection and control.

The cause was submitted to the court without the intervention of a jury as an action to "quiet title." However, your petitioner's cross-petiton was dismissed without a jury or an opportunity to be heard respecting the same, to all of which objections were made and exceptions taken by your petitioner at the time.

Whereupon, the Butler county Common Pleas Court, after consideration of the pleadings and evidence, found as follows:

> "This cause coming on for hearing, was submitted to the court on the pleadings and the evidence, and on consideration thereof, the court finds, on the issue joined, for the plaintiffs.
>
> The court further finds that at the time of bringing this action the said plaintiffs were in possession of the real property described in the petition, and that they had the legal estate in, and were entitled to possession of, the same; that the defendant has no estate in, or is entitled to the possession of, said real estate or any part thereof, and that the plaintiffs ought to have their

title and possession quieted as against said defendant, as prayed for in their petition.*

It is, therefore, ordered, adjudged, and decreed that the title and possession of the said plaintiffs to all, and singular, the premises in the petition described, to-wit:

> Beginning at a point in the south line of said inlot 106, located in the Village of Oxford, Butler County, Ohio, which point is one hundred four (104) feet west of the southeast corner of said inlot; thence east five (5) feet, more or less, to a point which is the southwest corner of the brick theatre building located on said inlot; thence north parallel with the east line of said inlot sixty-six (66) feet to the north line of said inlot; thence west five (5) feet, more or less, with the north line of said inlot to a point one hundred four (104) feet west of the northeast corner of said inlot; thence south parallel with the east line of said inlot sixty-six (66) feet to the point of beginning,

be, and the same hereby are, quieted as against the defendant, and all persons claiming under him, and he is, and they are, hereby forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of said plaintiffs, their heirs and assigns thereto.

It is further ordered that the defendant's cross petition be, and it hereby is, dismissed.

It is further ordered that the plaintiffs recover from the defendant their costs herein expended.

To all of which findings, orders, and judgment, the defendant and cross petitioner excepted, and here and now excepts."

Basis of Jurisdiction of This Court.

The basis of the jurisdiction of this court is that the petitioner has been denied his rights under the 5th, 7th and 14th Amendments of the Constitution of the United States of America: Under the 5th, with reference to being

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* The petition alleges that respondents owned a *fee simple* title to the property in question.

deprived of his life, liberty or property without due process of law; with reference to the 7th Amendment, in that he was denied a trial by jury on his cross-petition; and under the 14th Amendment of the Constitution, providing "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

> "The Supreme Court of the United States is the final arbiter of questions involving the due process and equal protection provisions contained in both state constitution and federal constitution."
>
> Paine v. Fox, 172 Tenn. (8 Beeler), 290, 112 S. W. (2d), 1.

Questions Presented.

This action was brought by the respondents as an action to quiet title under Section 11901 of the Ohio General Code and subsequent analogous section pertinent thereto.

1. The court erred in violation of the 5th, 7th and 14th Amendments of the Constitution when it digressed from the purpose of said original sections of the Ohio General Code and proceeded to reform your petitioner's title because the statutory time for doing so had elapsed.

2. The Common Pleas Court violated your petitioner's constitutional rights by dismissing your petitioner's cross-petition without granting him a hearing in regard to the same. Said cross-petition was duly served on the respondents, as evidenced by their reply, and was a matter properly to be tried before a jury.

3. The Common Pleas Court violated your petitioner's constitutional rights when it allowed your respondents' claim, based, not on the strength of their own title, but on a weakness they claimed to have discovered in your petitioner's title.

4. The Court of Appeals of Butler county, Ohio, also violated your petitioner's constitutional rights when it found as follows:

> "This cause is reduced to an appeal on questions of law for the reason that no bond was filed.
>
> An examination of the record discloses no error prejudicial to appellant, and the judgment is affirmed upon the reasoning stated in the opinion of Boli, J."

5. Your petitioner further claims a violation of his constitutional rights because this was instituted as an action to quiet title to real estate, and it is the law of this state under the statutes so made and provided that an action to quiet title to real estate shall fully settle all matters of dispute between the parties in respect thereto, which this action did not do.

6. Furthermore, your petitioner claims his constitutional rights have been violated because as this case was decided by the Common Pleas Court there was a fatal defect of necessary parties to this action.

7. A further constitutional violation by the Common Pleas Court was that said court did not make separate findings of fact and law as required by Section 11421-2 of the Ohio General Code, and as specifically requested by your petitioner herein at the outset of the trial before the Common Pleas Court, and did not docket the same as required by law along with the judgment in this case.

Reasons For Allowance of Writ.

Your petitioner's reasons for the allowance of the writ of certiorari is because your petitioner does not agree with the decision of the Supreme Court of Ohio which held on December 23, 1953, "that no debatable constitutional question is involved" for the reason that your petitioner is fully

prepared to show this court that the facts warrant a hearing in the light of the 5th, 7th and 14th Amendments of the federal Constitution and that one's property may not be taken without due process of law.

In this case, the property line, as newly established by the Court of Common Pleas, runs through the roof and cuts off the petitioner's overhanging eaves, which were built over forty years ago, and therefore the court has failed "to settle all controversies between the parties" with respect to their individual ownerships, but on the other hand, has decidedly created new ones.

Furthermore, the decree of the Common Pleas Court directly affects your petitioner's contractual relationship with the owner of the fee simple title; namely, Miami University, of which he is a lessee, for the reason that by this decree your petitioner will hereafter be compelled by law to pay university rent on five (5) feet of ground taken by said court off the west end of his lot and awarded to the respondents without his ever being privileged hereafter to use and enjoy the same as a lessee of Miami University.

Under his contract with Miami University, the university could sell the entire east 104 feet of Inlot #106, should your petitioner fail to pay land rent on any portion of the same, because said Miami University was not made a party to this action by your respondents.

> "Where rights of third persons are to be adjudicated in proceedings supplemental to execution, they must be made actual parties."
>
> State, ex rel. Phoenix Tax Title Corp., v. Viney, 120 Fla., 657, 132 So., 57.

Note: Also see laws pertaining to Miami University 1909 at page 65 in re: Miami University execution sales for non-payment of ground rent.

BRIEF.

OPINIONS OF THE COURTS BELOW.

For the opinions of the Court of Common Pleas of Butler county, Ohio, the opinion of the Court of Appeals of Butler county, Ohio, and the opinion of the Supreme Court of Ohio, see record pages 4-5, 32-51

STATEMENT OF FACTS.

The statement of facts for the purpose of granting of this writ are to be found in the foregoing under the following headings: Statement of matter involved. Chain of title. How this action arose.

SPECIFICATION OF ERRORS.

The specification of errors for the purpose of the granting of this writ are to be found under the heading: Questions involved.

ARGUMENT.

The arguments to follow with respect to the questions presented are all directed to the constitutional merits of your petitioner's right to a writ of certiorari in this case. **Therefore, errors of judgment of the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio in arriving at their decisions are purposely eliminated here.**

Question No. 1:

This court's attention is called to the fact that this action was instituted by respondents as an action to "quiet title." In such an action, the law required that one own a legal title or color of title before proceeding by a lawsuit to quiet the same.

It was very apparent from the exhibits and the testimony of the witnesses for both the petitioner and the respondents that the quit claim deed of November 2, 1950, from the Zora Beckett heirs to your respondents was out of the recorded chain of title, and that nowhere in respondents' chain of title were they granted more than the west sixty-one (61) feet of said Inlot #106.

The Common Pleas Court, therefore, in order to accomplish its purpose ignored this deed in its opinion and proceeded to reform your petitioner's chain of title, although it was more than thirty-three (33) years old, and give the west five (5) feet of same to the respondents by two theories of his own:

Theory #1: That there was a mistake in the description in your petitioner's chain of title with reference to an iron pin marking the place of beginning, although all the testimony of your petitioner's witnesses and respondents' witnesses clearly shows the contrary to be true.

Your petitioner contends there was no mistake, and furthermore, if there were truly a mistake it is outlawed by Section 11227 of the Ohio General Code which reads as follows:

> "An action for relief not hereinbefore provided for, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory."

and would prohibit the court's creating a new description as it did in this case.

> Also see Bryant v. Swetland, 48 O. S., 194, 27 N. E., 100.

The law holds: Actions to reform titles because of "mistake" are statutory and these statutes must be strictly followed. (See Sections 12210 to 12215 of the Ohio General Code where the law may give effect to defectively executed instruments or proceedings according to the intention of the parties.)

Although respondents attempted to show an error in the description, which your petitioner denies, it clearly was a unilateral and not a mutual mistake. Therefore, this does not entitle the court automatically to take ownership from the petitioner of record and give it to the respondents, as the court below did, because:

> "No relief will be granted in the absence of clear and convincing evidence that a mistake of fact was made and that such mistake was mutual."
>
> Bellish v. C.I.T., 142 O. S., 36, 26 O. O., 234 (1943).

Since your respondents and petitioner derive their respective ownerships through two distinctly separate consistent chains of title from Zora Beckett, which did not overlap, there was no mutuality between the petitioner as

successor to the east 104 feet and the respondents as successors to the west 61 feet of said Inlot #106, which is 165 feet long.

It was therefore unconstitutional for the court below to supposedly correct, alter or change in any way the description in petitioner's chain of title and add it to respondents' west 61 feet on the grounds of mutual mistake.

Theory #2: That your respondents were entitled to a title by way of prescription or adverse possession for over twenty-one years.

Section 11219 of the Ohio General Code on this subject reads as follows:

> "To recover real estate. An action to recover the title to or possession of real property, shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action, at the time thereof accrues, is within the age of minority * * *"

> "The burden of showing a title by adverse possession rests on the person who asserts it."
>
> Ohio Jurisprudence (2d), Vol. 1, page 797, par. 124.

> "The party asserting a title by adverse possession or a right by prescription must prove his case by a preponderance of the evidence. If a party claiming a prescriptive easement leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor."
>
> Ohio Jurisprudence (2d), Vol. 1, page 801, par. 129.

In this case the respondents did not even plead that they had a title by prescription or adverse possession for over twenty-one years, much less attempt to prove it. They relied solely on their quit claim deed of November 2, 1950, from the Zora Beckett heirs for their supposed source of title.

Under these circumstances, **100 years' occupancy of another's property, if not claimed by one adversely means absolutely nothing and no title or ownership would pass thereby.**

Note: The facts found by the Court of Common Pleas in his opinion were wrong, as shown by the witnesses for both sides, and the affidavit of Herschel Charles. (Record, p. 62.)

The Court of Appeals also violated your petitioner's constitutional rights when it expressly relied on the "reasoning" contained in Judge Boli's off-the-record opinion, after your petitioner had elected to rely upon the record and petitioner was not obligated to answer the false statements of fact contained in said off-the-record opinion, which wrong statements of fact were not to be found in the pleadings or the evidence of record in this case.

It was therefore unconstitutional for the courts to ignore the foregoing sections of the Ohio General Code, the pleadings and the evidence in order to unjustly favor the respondents in this matter.

Question No. 2:

The Court of Common Pleas deprived your petitioner of his rights guaranteed by the 7th and 14th Amendments of the United States Constitution when it summarily dismissed your petitioner's cross-petition without giving him an opportunity to be heard with respect to the same. The cross-petition contained allegations of malice, fraud and damages which are proper subject to be tried before a jury, because your petitioner has proved that the acts of respondents in preparing a foundation for their action to "quiet title" herein indicate they have not come into court with clean hands; but on the other hand, have maliciously con-

nived and schemed to deprive your petitioner of the title and ownership of his property, and they have damaged your petitioner's adjacent property regardless of whether the court was inclined to allow the respondents the disputed five (5) feet or not.

Your petitioner cites as his authority for this the following:

> "Cases may arise under our statute in which the parties may have a constitutional right to have the issues of fact tried by a jury. In such cases, the court may authorize such trial, either in the case or by requiring a separate action to be brought for the purpose before the rendition of the final decree."
>
> Rhea v. Dick, 34 O. S., 420 (at top of page 425).

The following would have been proper subject matter for your petitioner's cross-petition had the court not summarily dismissed the same without giving your petitioner a right to be heard:

The photocopies of letters from Roy Beckett to the petitioner, attached to petitioner's motion for rehearing before the Court of Appeals filed July 15, 1953, would have been introduced in evidence and supported by deposition or the testimony of witnesses showing fraud, deceit and malice on respondents' part in furthering their objective to deprive your petitioner of his rightful ownership, had not Judge Boli erroneously prevented the introduction of the same when he ignored and refused your petitioner his right to be heard upon his cross-petition.

Your respondents definitely misrepresented to the Beckett heirs the true situation, because there was no unconveyed land remaining in the Beckett name of record as the foregoing letters show.

Roy Beckett said that the Zora Beckett heirs were given to understand that there was five (5) feet of ground re-

maining in the Beckett name on the records, and in order to clear up the matter and prevent his aged mother from being involved or threatened with a lawsuit, they capitulated by signing a quit claim deed for what they were led to believe was an unconveyed five (5) feet, on November 2, 1950.

By this fraudulent means, your respondents obtained a quit claim deed to the east one hundred four (104) feet, or the entire of your petitioner's property, and then brought this action to compel your petitioner to prove what he really owned, but claiming five (5) feet of his property to themselves.

The result was to deprive your petitioner of his property without due process of law or compensation therefor, and furthermore, it did not afford your petitioner the equal protection of the law as guaranteed by the 14th Amendment of the United States Constitution.

Question No. 3:

Inasmuch as this is an action to "quiet title," the Common Pleas Court violated your petitioner's constitutional rights when it awarded your respondents ownership and an entirely new title to property it carved out of petitioner's long-established recorded chain of title, and which newly described tract was never included in your respondents' recorded chain of title.

The law holds:

> "The action cannot be brought to create a title that does not exist and then quiet the title so created, although the action may be one to determine whether of right the plaintiff ever had a title or color of title."
>
> Adjudication of Prior Equities, 33 O. J., 847, par. 6.

The evidence shows respondents had no title by prescription, no actual title, nor a color of title to the five (5) feet they claimed on which to base any claim whatsoever to said five-foot strip, which is entirely within your petitioner's recorded chain of title. (See Exhibit C, page 34, of bill of exceptions.) (Record, p. 83.)

It is essential that one must first have at least a color of title in order to maintain any legal action to "quiet title" in oneself.

The respondents attempted here to acquire and have quieted in themselves by court decree, the title and ownership of a portion of land which was never in their own recorded chain of title.

This was done by making a direct attack on your petitioner's recorded chain of title to the east one hundred four (104) feet of said Inlot #106, on which your petitioner and his predecessors have been paying county taxes, and Miami University land rent pursuant to a special contract in writing with Miami University (See page 45 of the bill of exceptions), for a period of nearly thirty-three years. (Record, p. 111.)

Your respondents' recorded chain of title consistently includes only the west sixty-one (61) feet of said 165-foot inlot and no more.

There is no legal basis for such an attack by respondents because the courts universally hold that:

> "It is axiomatic that in an action to quiet title the plaintiff must recover on the strength of his own title."
>
> Kerfott v. Kessener, 1949, 227 Ind., 58, 75, 84 N. E. 2d, 190;
>
> Kozanjieff v. Petroff, 1939, 215 Ind., 286, 291, 292, 19 N. E. 2d, 563, 122 A. L. R., 479.

Your respondents and their predecessors were given certain definite and restricted privileges as to the use of your

petitioner's property to the south and west of the theatre wall proper, over land belonging to the petitioner and his predecessors, contained in the Zora Beckett to Keen deed (See Record, p. 8-3.)

Therefore, the respondents had no legal right to raise any issue concerning the title to any of the east one hundred four (104) feet of said inlot, since the chain of title through which they derived their title consistently described only the west sixty-one (61) feet of said inlot and no more.

Respondents had nothing except an easement reserved in the original deed from Beckett to Keen, wherein the respondents' predecessor was given the right to construct his building against the south and west walls of the theatre building in accordance with the wording of said deed.

Your petitioner submits that in law this was merely a license to respondents' predecessor in title and was a deed in fee simple in your petitioner's land.

> "A 'license' in respect to real property operates merely as a privilege to go on premises for a certain purpose, and a protection to licensee for all acts done by him within scope of his license, and it does not operate to confer upon or vest in licensee any title, interest or estate in such property, and licensee is 'estopped' during time that license exists to deny title of licensor or of any one claiming under him."
>
> Wood v. Gregory, Mo., 155 S. W. 2d, 168, 171, 138 A. L. R., 142.

It is perfectly obvious from the wording of the Beckett to Keen deed of July 7, 1920, that Beckett intended, as the record shows, to grant Keen title to the entire east one hundred four (104) feet of Inlot #106, which includes five (5) feet of ground west of the brick theatre building's west wall, but with the reservation that he, meaning Beckett,

and his heirs and assigns owning the west sixty-one (61) feet or the remainder of said inlot, be permitted to extend his roof eastwardly and use a passageway or easement through the southwest corner of said theatre building.

Respondents, however, through some quirk of their imagination, or perhaps wishful thinking, have contended that this reservation should be interpreted to mean that Beckett never intended to grant Keen title to any of the five (5) foot strip of land lying immediately to the west and to the northwest of the theatre west wall for an even distance of five (5) feet.

Your petitioner contends this is a ridiculous position for respondents to assume because a simple query here serves as its own equally simple answer: Why would grantor Beckett reserve a right in his deed to Keen to use a passageway and extend his roof if he did not by that same deed convey the basic title to the Keens?

Certainly respondents cannot ignore the fundamental law that an owner does not need to reserve any rights to build on his own land. An owner has that right simply by reason of his ownership.

It is equally evident that Beckett did intend to pass the title to the entire east one hundred four (104) feet of said inlot to the Keens because the reservation of an easement in a given specific title one passes to another proves per se, that Beckett meant to, and did in fact, pass the title to Keens, and thereby also reserving to respondents' predecessor but a qualified use or easement over a small portion of the same.

Question No. 4:

The Court of Appeals of Butler county, Ohio, violated your petitioner's constitutional rights because at the outset of the appeal your petitioner made a choice at the suggestion of the court based on the belief that if the pleadings and the bill of exceptions were adequate there would be no need to retry this entire case in order to make a new record.

Your petitioner concluded the pleadings, testimony and evidence in the record were adequate to sustain his cause.

Your petitioner was astounded when the respondents then proceeded to offer a brief containing the "off-the-record" opinion of the Court of Common Pleas.

Your petitioner had no defense against the untruths with which it was filled.

Furthermore, when the Court of Appeals allowed it to remain after your petitioner unsuccessfully moved to have the same removed, only then did your petitioner realize he had taken on a new foe in the person of the Common Pleas Court itself.

To make matters doubly unfair and worse, the Court of Appeals then rendered the following opinion of its own:

> "This cause is reduced to an appeal on questions of law for the reason that no bond was filed.
>
> An examination of the record discloses no error prejudicial to appellant, and the judgment is affirmed upon the reasoning stated in the opinion of Boli, J."

Your petitioner then offered the following authorities in support of his constitutional right to have his cause tried on the pleadings and the evidence of record, and not upon the false conclusions of fact in the off-the-record opinion of Judge Boli of the Common Pleas Court, which is neither the law nor the true facts as they occurred or were

to be found in the pleadings and the evidence of record in this case:

"Everything done in court should be open and appear in record."

(1931) Battenheiser v. Cincinnati, 41 App., 303, 180 N. E., 209.

"The record is required to embrace the orders, judgments and all the material acts and proceedings of the court."

(1889) Braden v. Hoffman, 46 O. S., 639, 22 N. E., 930.

"The requirements of a rule that a court speaks through its journal entries, are not met by an oral pronouncement from the bench by the trial judge, without the preparation and filing of a journal entry."

(1948) Cox v. Fogle, 84 App., 179, 39 O. O., 223, 82 N. E. (2d), 875.

"Under Ohio law, all judgments and orders must be entered on the journal of the court and specify clearly the relief granted, and such entry may be compelled."

(1936) In Re: Ackerman, 82 F. (2d), 971.

Your petitioner contends that the "reasoning stated in the opinion of Boli, J." was not properly a part of the record of this case, and your petitioner's briefs below therefore, purposely omitted all arguments refuting the many pertinent factual misinterpretations and erroneous legal conclusions by Judge Boli; and petitioner confines himself only to the final judgment entry of record and the uncontroverted factual matter as disclosed in the pleadings and bill of exceptions, when the case was appealed to the Supreme Court of Ohio.

Petitioner's authority for taking this position was as follows:

See Ohio Jurisprudence, Volume 2, page 167, par. 88:

> "A judgment is the final determination of a court of competent jurisdiction upon matters submitted to it. A mere finding of fact by a court in a law case is in no sense such a judgment, and no appeal on question of law can be taken therefrom."

Page 168:

> "And a written opinion by a court is not a judgment particularly where it was not signed by the court and not couched in the form of an order, judgment or decree."

However, Rules of Practice of the Supreme Court of Ohio (January Term, A. D. 1953), Rule VIII, page 13, states the following: "Opinions should be added as appendix at the end of the brief."

Section 3 of said Rules of Practice requires the filing of "(f) Copies of all opinions rendered in the case by the trial and reviewing courts."

Only when thus required to add the same to your petitioner's brief did your petitioner find it necessary also to show the Supreme Court the absolute fallacy of the finding of fact by the Court of Common Pleas, by obtaining and introducing the affidavit of Herschel Charles. (Record, p. 42.)

The affidavit shows conclusively the false "reasoning" on the subject of adverse possession of the Court of Common Pleas which the Court of Appeals of Butler county followed without due regard for the true facts and the law as adduced from the pleadings, the testimony and exhibits of record in this case.

Therefore your petitioner claims his constitutional rights to a fair trial have been violated thereby.

Nearly every statement in Judge Boli's opinion is refutable by your petitioner, but as stated at the outset of this brief, errors of this court's reasoning or judgment alone are not regarded by your petitioner as unconstitutional, but to take advantage of an off-the-record opinion to deliberately misrepresent the truth as found in the record and as shown, for example, by the affidavit of Herschel Charles, is denying your petitioner the protection of his constitutional rights, because there is no legal way in which he can disprove or deny the falsehoods as enunciated by the court.

As a protection against this very thing, your petitioner did, at the outset of this trial, ask for a separate finding of fact and law; but this, too, was denied him by the court's neglecting to make or docket such a finding (as will be discussed in a later argument).

Question No. 5:

The Common Pleas Court's decision that the west wall of the theatre building marked the west property line of your petitioner's portion of said lot was in total disregard of the overhanging eaves on your petitioner's property, the effect of which would be to sever and divide the roof of your petitioner's theatre property which has existed for over forty (40) years as is, and thereby give it to the respondents.

The law holds that:

> "The effect of an action to quiet title is to determine all matters affecting the title to the lands in question as between the parties to the suit; the decree operates to determine all claims to interests therein, whatever their form or character, existing at the time the decree is rendered."
>
> Effect of Decree. 33 O. J., p. 944, par. 142.

Certainly, then, to divide the roof of the theatre building and to arbitrarily give part of it to the respondents is without legal precedent or foundation in law, and without compensation to your petitioner is a violation of your petitioner's constitutional rights in that it deprives him of his property without due process of law.

There was never a scintilla of evidence introduced anywhere in this case that respondents had ever paid university land rent or county taxes on the five (5) feet of ground to which they have laid claim by this action, whereas your petitioner has always paid the land rent and county taxes on the same.

And in this action to quiet title the court has not fixed the amount of rent or determined who shall pay the university for the same on the five (5) feet of land taken from your petitioner herein and awarded to the respondents in "fee simple."

Obviously, then, there can be no valid decree here to quiet title, because the landlord (Miami University) should also have been made a party to this action; and the court should have acted under the acts of the Ohio legislature establishing said university and providing for the method of the subdivision of university and and the charging of rent therefor. (See Laws Pertaining to Miami University, 1909, page 93.)

Consequently, the court has utterly failed to settle all differences even between those parties already before it with respect to the nature of their ownership of the property in question as required by law in all actions to "quiet title."

Your petitioner's right to continue under the Miami-Beckett-Keen subdivision contract of July 7, 1920, with respect to the payment of land rent on the east one hun-

dred four (104) feet of Inlot #106, and the full enjoyment of said east one hundred four (104) feet as lessee of said university is a private contractual right with said university.

"Where rights of third persons are to be adjudicated in proceedings supplemental to execution, they must be made actual parties."

State, ex rel. Phoenix Tax Title Corp., v. Viney, 120 Fla., 657, 163 So., 57.

" 'Due process of law' is law in its regular administration through courts of justice, and means course of legal procedure according to those rules and principles which have been established in system of jurisprudence for enforcement and protection of private rights."

Gray v. Hall, 265 P., 246, 252, 203 Cal., 306;
Ryan's Furniture Exchange v. McNair, 162 So., 483, 120 Fla., 109;
Floyd v. Chesapeake & O. Ry. Co. (W. Va.), 164 S. E., 28, 31.

Question No. 6:

Had this case been determined in favor of your petitioner, it would not have been necessary to include the President and Trustees of the Miami University as a party defendant hereto; but the adverse decision of the Common Pleas Court automatically creates a new interest as necessitates the inclusion of said university as a party defendant herein.

Judge Boli of the Butler county Common Pleas Court made absolutely no ruling in this case whatever respecting the all-important Miami University land rent contract entered into between said university, the Becketts and the Keens simultaneously with the execution of the Beckett to Keen deed of July 7, 1920, respecting the subdivision of

said Inlot #106. (See copy of university contract under subject "Chain of title" herein.)

A brief explanation as follows should serve to clarify and emphasize its importance as to why Judge Boli's judgment is really not "final" or a settlement of all the issues in this case between the parties.

> "The effect of an action to quiet title is to determine all matters affecting the title to the lands in question as between the parties to the suit * * *
>
> And a judgment rendered in a suit to quiet title against a claimant under an invalid tax deed is not binding on the real owner, who is not a party to the suit.
>
> 33 O. J., 944, par. 142.

Therefore:

> "In accord with the rule in civil actions generally, in an action to quiet title or remove a cloud, all persons whose interest will be necessarily affected by the decree sought, or without whom no effective decree can be rendered, are necessary parties.
>
> Persons having a right to litigate the same issues over again in a new proceeding are necessary parties, sometimes to avoid future litigation by settling the rights of all persons interested in the subject-matter, and sometimes because they ought to be privy to the decree, so as to make it evidence in future actions between the parties."
>
> 33 O. J., p. 928, par. 120.

According to the Miami University, Beckett and Keen contract of July 7, 1920, it was agreed that Keen, the grantee, should henceforth pay rent on the east one hundred four (104) feet of Inlot #106, and Beckett, the grantor, was to pay rent on the west sixty-one (61) feet thereof retained by him.

In the matter now before this court, Judge Boli by his judgment herein created a distinctly new description which

he carved out of your petitioner's chain of title to the east one hundred four (104) feet of Inlot #106, and has awarded the west five (5) feet of the same to the respondents herein in "fee simple" while utterly disregarding the fact that your petitioner and your respondents are but lessees of Miami University.

No new contract was made, ordered or submitted to the president and trustees of the Miami University as is required by law for a new division of land rent, nor has the university been made a party to this action by respondents below whereby any court order respecting the same would be valid.

The result is that should this judgment stand, the petitioner will forever after be paying land rent by contract to Miami University on the east one hundred four (104) feet of Inlot #106, while he is only privileged to use but the east ninety-nine (99) feet thereof.

This certainly is in direct violation of your petitioner's constitutional rights and a taking of his property without due process of law.

Furthermore, on execution sale for non-payment of rent, should that situation arise, the university sheriff would sell the east one hundred four (104) feet of said inlot because the university is not a party to this action to quiet title below and would not be bound thereby.

Furthermore, the university is not a party to the deeds between the lessees, but is a party to and has signed the aforementioned subdivision contract to charge a fixed rental on the east one hundred four (104) feet and the west sixty-one (61) feet, respectively, of said Inlot #106.

In other words, the university in renting Inlot #106 has agreed to specifically fix the rent and divide the

ground pursuant to an express written contract between it and its tenants.

Neither tenant can claim more than his respective share under that contract because to do so would be to dispute the landlord's title, and it has been held that:

> "As to landlord's title.—The general principle is well settled that a tenant cannot, so long as he remains in possession, deny or dispute his landlord's title. This is true even though the landlord's title is merely possessory. It is true also of persons in privity with the tenant or who come in under him. * * *"
>
> 16 O. J., p. 162, par. 136.

Furthermore, since your respondents claimed "fee simple" title to the disputed five (5) feet in their petition, and the court furthermore has erroneously held your respondents are entitled to what they have "prayed" for, it was unconstitutional for the court to confirm a "fee simple" title in your respondents without making the president and trustees of the Miami University a party to this case, because it is quite obvious that the "fee simple" title rests in the university and not in the lessees of the university, and any change in the portions of land held by these adjoining tenants is a matter that is of material interest and concern not only to the parties to this suit but to Miami University as well.

Question No. 7:

A further constitutional violation by the Common Pleas Court was that it did not make and docket a separate finding of facts and law as is required under Section 11421-2 of the Ohio General Code as follows:

> "Findings when case tried by court. When questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon ques-

tions of law involved in the trial, one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

Also:

"* * * it is the duty of the court as a part of its judgment to make answer to all interrogatories involving the ultimate facts of the controversy, and to all involving probative facts from which the ultimate facts can be inferred as a matter of law, and its failure to do so is reversible error."

Produce Company v. Dennert, 104 O. S., 149, 135 N. E., 531.

"Former G. C. Sec. 11470 requiring conclusions of fact is mandatory, and is applicable and failure of court to comply therewith requires reversal, though later entry was filed stating conclusions of fact separately."

Garver v. Trust Co., 29 O. App., 433, 171 N. E., 362, 30 A. L. R., 572.

In this case, as the docket of the Common Pleas Court clearly shows, your petitioner's request for a separate statement of facts and the law by the court under the foregoing Ohio General Code sections was timely.

The record of this case clearly shows the court failed to make as a part of its judgment any such separate finding of fact and law in this case.

Therefore, the record of this case clearly shows the Common Pleas Court violated your petitioner's constitutional rights with respect to the "due process" clause of the 14th Amendment of the Constitution by ignoring and failing to comply with the requirements of Section 11421-2 of the Ohio General Code which section was enacted by the Ohio legislature pursuant to authority vested in it under the

Ohio and federal constitutions for the preservation and protection of a litigant's private property rights under said constitutions.

It is a mandatory section. It was not complied with, and has directly affected your petitioner's opportunities to properly discredit the Common Pleas Court's false findings and reasoning in its off-the-record opinion, which "reasoning" the Court of Appeals admittedly in its opinion used as a basis of affirmance of this case below.

The Ohio Supreme Court also definitely violated your petitioner's constitutional rights when it affirmed the lower courts' opinions on a basis that no controversial constitutional questions were presented by your petitioner in this case.

CONCLUSION.

In conclusion, petitioner says that the disputed five (5) feet of ground west of the theatre building, claimed by respondents, has always rightfully belonged to petitioner because of the irrefutable evidence presented by petitioner in this case, and also by the testimony of respondents' own surveyor and witnesses showing that said five (5) feet of ground was and is definitely a part of petitioner's east one hundred four (104) feet of Inlot #106.

Petitioner's ownership of the east one hundred four (104) feet of Inlot #106 was also proved conclusively by the written agreement on file at Miami University, and signed by the proper officials of said university, agreeing to a division of the original lease and land rent on said lot according to law, which was fixed at the time Beckett deeded to Keen on July 7, 1920; which university files also prove that since the Beckett to Keen deed and the Beckett to

Miller deed, no land has remained of record in the name of Zora Beckett or his heirs.

Therefore, respondents had absolutely no right to question, interfere or tamper with petitioner's chain of title, in trying to obtain illegally land which they were partially permitted to use by easement.

Respondents must rely entirely upon the strength of their own chain of title, which is only to the west sixty-one (61) feet of said Inlot #106, strict measure.

Also, the Butler county tax records, in addition to the Miami University land rent records, show conclusively that Zora Beckett deeded to Miller in 1928 (through whom respondents claim), all the remainder of his right, title and interest in and to said Inlot #106, and that thereafter Beckett or his heirs had absolutely no interest, taxable or otherwise, to deed to respondents on November 2, 1950, and on which respondents have relied in this case as confirming in them a title on which to base this action to quiet title.

Petitioner has further conclusively proved that respondents had absolutely no legal title or color of title by which they could maintain their proceedings to "quiet title" to the east one hundred four (104) feet of Inlot #106, but only to the west sixty-one (61) feet of the same.

Petitioner has further conclusively proved that the proceedings in the lower courts have clearly violated petitioner's constitutional rights under the 5th, 7th and 14th Amendments of the Constitution of the United States; and further, that this case is one of great public moment and interest.

Petitioner has proved that should the lower courts' decisions be upheld in this matter, no land owner's property rights would be safe because any person having an ease-

ment for the use of a portion of said property could come into court and take said property as his very own. The case of Kyger v. Williams would have already established a precedent for this illegal and unconstitutional act.

Petitioner therefore prays that his petition for a writ of certiorari be granted; and in the event the court finds it proper:

That the decisions of the Butler county Common Pleas court, the Butler county Court of Appeals and the Supreme Court of Ohio be reversed and that this court order cancelled of record or held for naught respondents' quit claim deed of November 2, 1950, from the widow and heirs of Zora Beckett, in so far as it affects the east one hundred four (104) feet of Inlot #106; and that petitioner's title to said east one hundred four (104) feet be declared clear, free and unincumbered except as to the use of the passageway, easement or reservation contained in the deed of July 7, 1920, from Beckett to Keen, and also excepting Miami University claims for ground rent; that petitioner be allowed to try this case on his cross-petition as if this appeal had not been taken, either in this action or without prejudice in a subsequent action brought for the purpose; and any and all further relief, legal and equitable, to which petitioner may be entitled; and that the costs of this action be assessed against the respondents herein.

Respectfully submitted,

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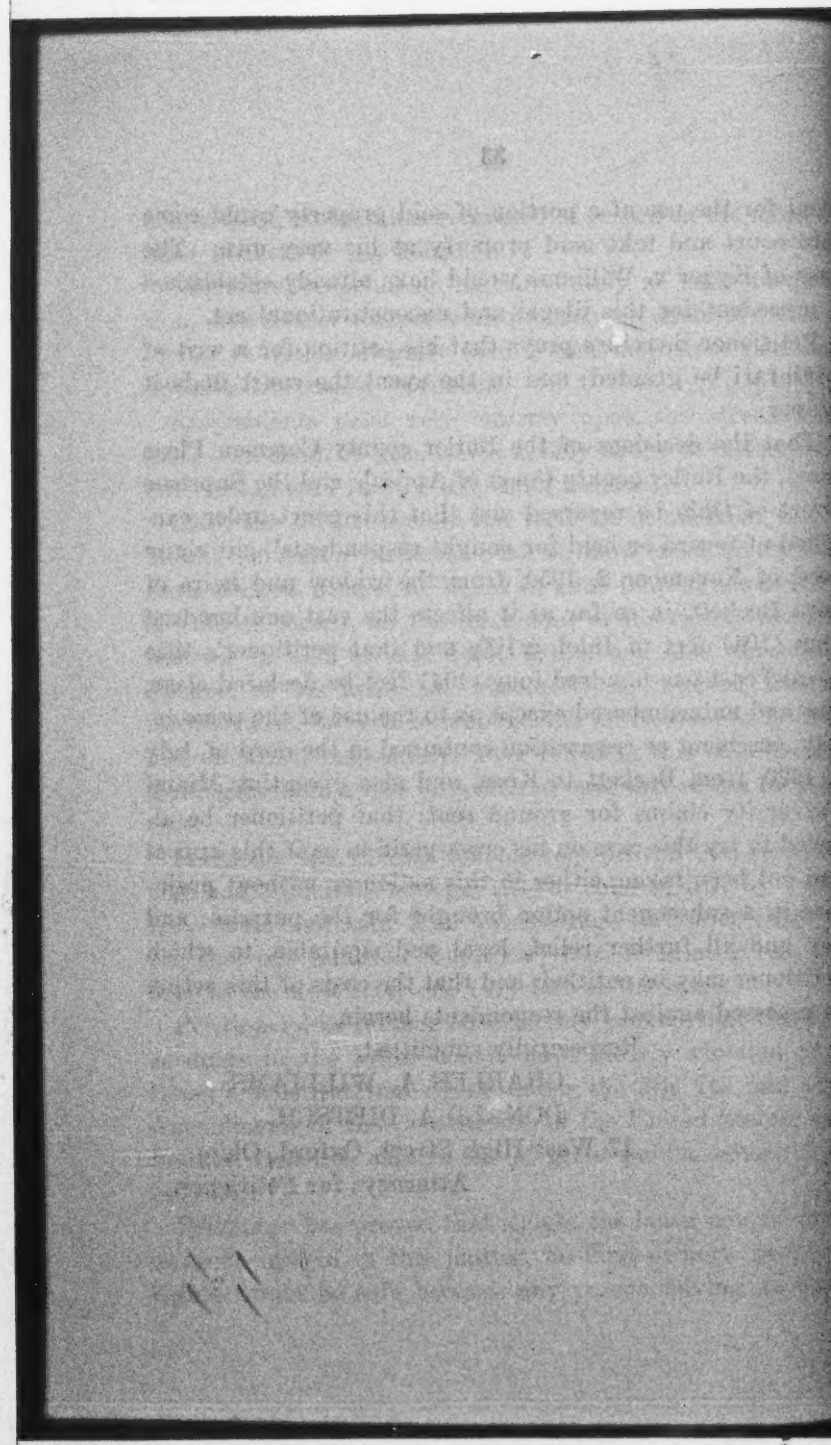

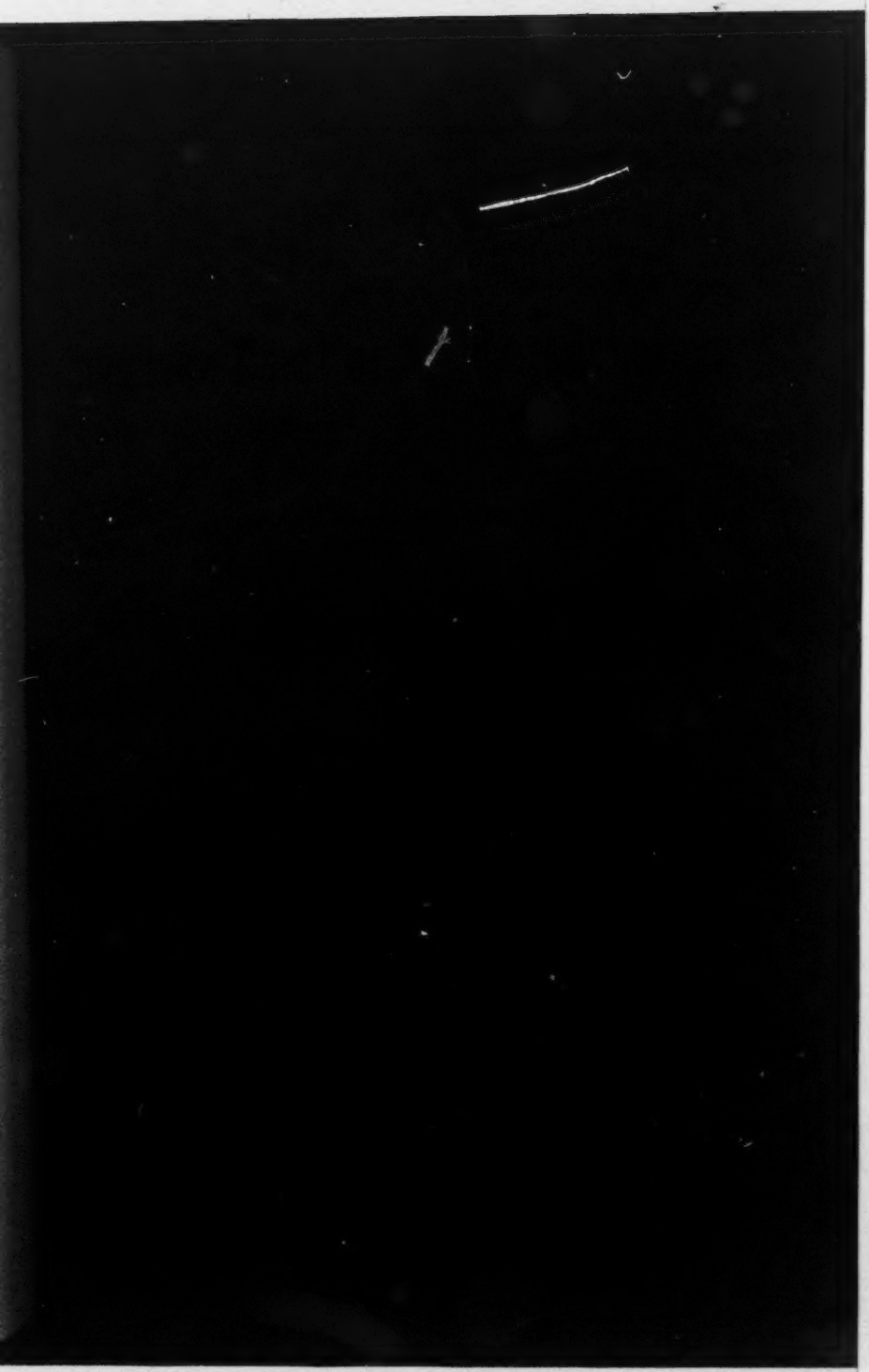

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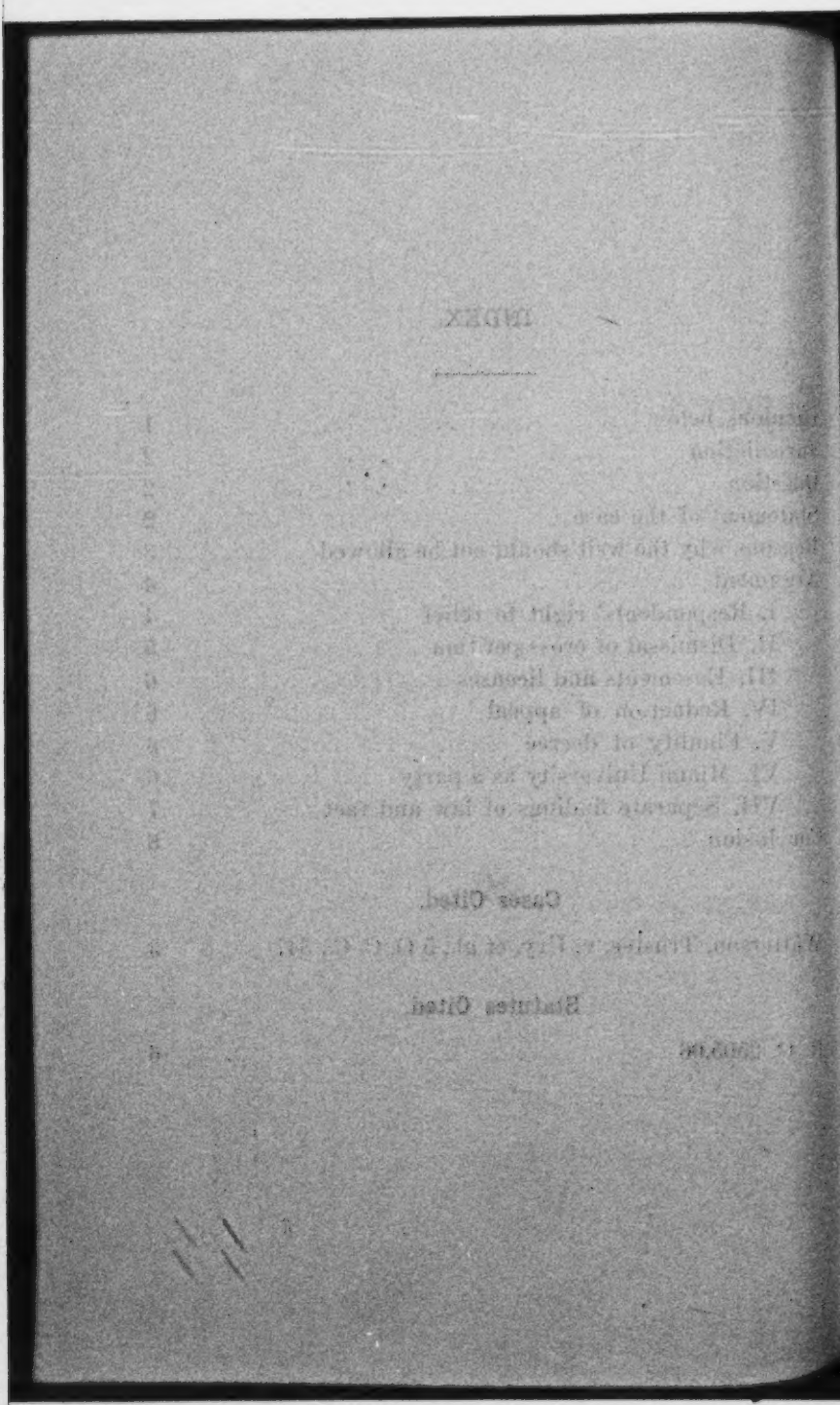

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 679.

CHARLES A. WILLIAMS,

Petitioner,

vs.

GEORGE H. KYGER AND MARIE KYGER,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio appears at page 51 of the record herein and is reported at 160 Ohio St., 507. The opinion of the Butler county, Ohio, Court of Appeals appears at page 22 of the record. The opinion of the Butler county, Ohio, Court of Common Pleas appears at page 5 of the record.

JURISDICTION.

Apparently the petitioner's claim of jurisdiction is under 28 U. S. C., Sec. 1257 (3). It is the respondents' position that no rights, privileges, or immunities of the petitioner have been violated in the determination of this cause below.

QUESTION.

Did the Supreme Court of Ohio violate any right, privilege, or immunity of the petitioner when it dismissed his appeal for lack of a debatable constitutional question; that appeal being from decisions of the lower courts which decisions interpreted a deed through which the petitioner claimed title and which reaffirmed the elementary proposition that monuments control over distances?

STATEMENT OF THE CASE.

Petitioner disputed the respondents' title to a five foot strip of land, a part of inlot 106, situate in the village of Oxford, Butler county, Ohio.

Respondents filed an action to quiet title in the Butler county, Ohio, Court of Common Pleas. Petitioner filed an answer in denial and a cross-petition praying that title be quieted in him and praying for exemplary and compensatory damages occasioned by the filing of the petition.

The action was heard by the trial court without the intervention of a jury and the trial court found in favor of the respondents and ordered title quieted in them. The trial court dismissed the petitioner's cross-petition.

Petitioner appealed on question of law and fact to the Butler county Court of Appeals which appeal was reduced

to an appeal on questions of law only by reason of petitioner's failure to file a supersedeas bond.

The Court of Appeals affirmed the decision of the trial court and petitioner prosecuted an appeal as of right to the Supreme Court of Ohio as well as filing a motion to certify with that court. The Supreme Court of Ohio dismissed the appeal as of right and overruled the motion to certify.

REASONS WHY THE WRIT SHOULD NOT BE ALLOWED.

This cause presents no conflict of decisions.

The question presented is relatively unimportant. The case calls for the application of well established rules of deed interpretation and it turns upon its own facts.

The cause was correctly determined below under the laws of the state of Ohio and the petitioner has been denied no right, privilege, or immunity under the Constitution in the determination of this cause.

ARGUMENT.

Fundamentally this cause presents a question of deed interpretation. Petitioner has erroneously maintained in his brief herein, and throughout the course of his appeal, that his chain of title gave him the east 104 feet of inlot 106. Through unvarying mesne conveyances, petitioner's title is based on the deed set forth at page 83 of the record.

The first call of that deed is controlling and it is as follows:

> "Beginning at a point in the south line of said In Lot No. 106 marked by an iron pin, which point is at the south-west corner of the brick theater building located on said In Lot; thence east with the south line of said In Lot No. 106 a distance of one hundred and four (104) feet, more or less, to the south-east corner of said In Lot; * * *"

The uncontroverted fact is that the distance from the southwest corner of the theater building to the southeast corner of the inlot is 99 feet. (R., 55.) It was so found by the trial court. (R., 7.)

In the face of this fact and the more or less call of the deed, the petitioner has maintained that he received 104 feet by strict measure and upon that he founds his claim that his property has been taken from him.

It is readily apparent from a reading of the deed referred to, which deed begins the petitioner's chain of title, that petitioner never had more than the east 99 feet of inlot 106 and that his claim to the five feet immediately west thereof is without foundation. The trial court also found that the respondents and their predecessors had been in possession of the five foot strip for more than 30 years. (R., 10.)

We proceed to consider the propositions advanced by the petitioner in the same order as they are presented in his brief.

I.

Contrary to the petitioner's claim, the trial court did not reform the titles involved and it did not find for the respondents on the basis of adverse possession. This is clearly apparent from the opinion of the trial court appearing at pp. 5-17 of the record.

Petitioner also questions the right of the respondents to maintain an action to quiet title. Without considering respondents' valid claims to the title to the five foot strip, it is sufficient to point out the possession of the five foot strip (R., 10) and call the court's attention to the following quotation. In **Watterson, Trustee, v. Ury, et al.**, 5 O. C. C., 347, the court said at page 354:

> "* * * the mere naked possession of real estate is sufficient to enable a plaintiff to maintain an action to quiet title, and that unless a better title be shown by defendant, the plaintiff will be entitled to a decree."

II.

The dismissal of petitioner's cross-petition by the trial court was proper. Upon decision that the respondents were entitled to the relief which they sought, there was no possible reason why the petitioner's request for damages occasioned by the filing of the petition should be given any consideration. At the trial stage, this cause went forward on the primary issue only with the consent of counsel.

III.

Since it is definitely established that the petitioner never had title to more than the east 99 feet of inlot 106 and never had title to the five foot strip in question, the references to easements and licenses have no merit herein.

IV.

The appeal before the Court of Appeals was properly reduced from an appeal on questions of law and fact to an appeal on questions of law only for the petitioner's failure to file a supersedeas bond. R. C. 2505.06 (former G. C. 12223-6).

Petitioner exhibits confusion with regard to the part played by the opinion of the trial court in the appeal of this cause. Petitioner's appeal was taken from a journalized judgment of the trial court and that was affirmed by the Court of Appeals. The fact that the Court of Appeals adopted the reasoning of the trial court in affirming the trial court's judgment does not indicate that they were reviewing an opinion and not a judgment.

V.

All questions relative to the title to the disputed strip were decided and the petitioner's claim with regard to the eaves of his building is frivolous.

VI.

Miami University holds the fee simple title to inlot 106. Petitioner and respondents hold 99 year leases, renewable forever. The contracts with Miami University serve the

sole purpose of providing the university with a list of its tenants and the amount of annual land rent that each agrees to pay. The title to the land is revealed by the deeds only.

Miami University was neither a necessary or proper party. This litigation affected the rights of Miami University in no way whatsoever.

If Miami University had been a necessary or proper party, petitioner could have joined it. This he did not do. He did not assign this point as error before the Court of Appeals. (R., 22.) The question was first raised before the Supreme Court of Ohio. (R., 45.) Thus, even if considered proper, the matter was not timely raised.

VII.

Contrary to petitioner's contention, the trial court did make separate findings of law and fact in its opinion as requested by the petitioner. The findings of fact appear in the record beginning at page 5 and the findings of law appear at page 16.

It is apparent for several reasons that the petitioner cannot rely on the fact that these findings were not journalized in a separate entry is violative of his constitutional rights. First, as moving party, it was incumbent upon the petitioner to prepare the entry for journalization. Second, he approved the judgment entry as it is set forth at page 19 of the record. Third, the petitioner elected to appeal to the Court of Appeals on questions of law and fact, a trial de novo, thus negating the purpose of separate findings. Fourth, he did not assign this as error before the

Court of Appeals (R., 22); it was first raised before the Supreme Court of Ohio (R., 45), and this was not timely even if considered proper.

CONCLUSION.

It is submitted, therefore, that the petitioner's petition before this court is patently without merit in that there has been no denial of petitioner's rights, privileges, or immunities under the Constitution in the determination of this cause below.

It is respectfully requested that the petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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